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MARKETING AGREEMENTS UNDER THE AGRICULTURAL ADJUSTMENT ACT: THEIR CONTENTS AND CONSTITUTIONALITY

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On May 12, 1933, the President approved the *Agricultural Adjustment Act*[1] and thereby the United States entered into a legal and economic experiment entirely novel in its history. It is very naturally my purpose to emphasize the legal aspects of the new law and only to discuss its economic and political consequences as they may form the background for and affect the legal structure.

The *Agricultural Adjustment Act* begins, as does most of our recent progressive legislation, with a "declaration of emergency" in the following words:

> "That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed

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The author desires to acknowledge the great assistance he received from a memorandum on the subject of the constitutionality of the Agricultural Adjustment Act prepared by his partner, Claude C. Smith, Esq., of the Philadelphia Bar, and from C. Edward DePuy, LL. B., Columbia, 1933, in the preparation of annotations.

[1] 48 STAT. 31, U. S. C. A. (Special Pamphlet No. 4, July, 1933) 83. It is interesting historically to note that the National Industrial Recovery Act in § 8a, enacted after the passage of the Emergency Farm Mortgage Act, provides that Title I of the Emergency Farm Mortgage Act may be referred to as the "Agricultural Adjustment Act" (H. R. REP. No. 5755, 73d Cong., Special Sess., Ser. No. 67) § 8a.

the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act." [2]

Following the declaration of emergency appears the declaration of policy, as follows:

"It is hereby declared to be the policy of Congress—

(1) To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco shall be the prewar period, August 1909-July 1914. In the case of tobacco, the base period shall be the postwar period, August 1919-July 1929.

(2) To approach such equality of purchasing power by gradual correction of the present inequalities therein at as rapid a rate as is deemed feasible in view of the current consumptive demand in domestic and foreign markets.

(3) To protect the consumers' interest by readjusting farm production at such level as will not increase the percentage of the consumers' retail expenditures for agricultural commodities, or products derived therefrom, which is returned to the farmer, above the percentage which was returned to the farmer in the prewar period, August 1909-July 1914." [3]

As is now known to every one, the purposes mentioned in the above quoted paragraphs are to be accomplished in part by inducing the producers of basic agricultural commodities to curtail their production in return for which the federal government is to pay them bonuses in cash or, in some cases, in commodities. A great deal has been written with respect to this feature of the Act and with respect to the processing taxes authorized by the Act. Very little has been written with respect to that part of the Act which authorizes the Secretary of Agriculture to enter into marketing agreements, and it is to that feature that I desire to address myself.

The Act reads as follows:

"In order to effecuate [*sic*] the declared policy, the Secretary of Agriculture shall have power . . .

(2) To enter into marketing agreements with processors, associations of producers, and others engaged in the handling, in the current of interstate or foreign commerce of any agricultural commodity or product thereof, after due notice and opportunity for hearing to

[2] *Id.* § 1.
[3] *Id.* § 2.

interested parties. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: *Provided,* That no such agreement shall remain in force after the termination of this Act." [4]

This clause in the Act is of particular interest because, if it remains in force, through it a legal system entirely new to the United States will grow up. Through this medium, upon producers and distributors reaching an agreement and upon the approval thereof by the Secretary of Agriculture, by reason of the *Agricultural Adjustment Act,* that agreement becomes in effect a law, and when licenses are issued thereunder it becomes binding on all the persons in the territory affected by the agreement whether or not they are voluntary parties thereto. In other words, instead of the law being made by Congress the law in effect is made by the agreement of a majority of the parties affected and by the approval of the executive branch of the federal government.

It should also be noted that the above quoted clause of the Act renders inoperative all of the federal antitrust laws and in effect permits monopolies if approved by the Secretary of Agriculture.

It has been my privilege during the summer to draft or assist in drafting eight or nine marketing agreements under this clause of the Act, and I felt that it would be of interest briefly to outline what those agreements contained and to discuss some of the clauses in them which have met with the approval of the government in those agreements which are now in force.

A marketing agreement is very much like any other contract. The contracting parties have been, so far, associations of producers of agricultural commodities and distributors of those commodities, together with any individual producers who desire to join. The names of the parties are followed by the definitions of the various words as used in the agreement, including a list of the various associations affected and a statement of the area in which the agreement is to be effective.

The agreement then covers the following important subjects:

1. The fixing of wholesale and retail prices.
2. A list of rules governing fair trade practice.
3. A method of administration of the agreement.
4. Usually a somewhat elaborate system by which it is hoped production will be controlled.

Retail Price Fixing

The Department of Agriculture has, to date, approved a number of agreements governing milk and its products. Each of these agreements

[4] *Id.* § 8 (2).

has fixed the minimum price at which milk should be purchased from producers and has fixed the price at which milk should be sold at both wholesale and retail to consumers. It should be noted that this fixing of prices has gone much further under the *Agricultural Adjustment Act* than it has under the *National Industrial Recovery Act.* The National Recovery Administration, with one exception,[5] has refused to fix prices definitely, but it has approved in almost every code a clause to the effect that there shall be no selling at less than cost of production. The clause then continues to define the method by which cost of production shall be determined.

Fair Practice Rules

Next in importance to the fixing of prices, in which of course the producer is primarily interested, are the fair practice rules, sometimes called rules of fair competition. In order to illustrate what is now becoming the law in some areas under the *Agricultural Adjustment Act* I should like to quote a few of these rules.

> "*Samples*—1. It shall be considered unfair practice to put out goods as samples." [6]
>
> "*Special Inducements*—4. It shall be considered unfair practice to give or pay to any hotel, apartment, or factory owners, managers, janitors, receiving clerks, maids, housekeepers, linen-room attendants, or any other persons, money, compensation, gratuity, free milk, cream, or the derivatives of milk, or discounts for either business or information or assistance in procuring business, and any employee violating the provisions of this paragraph shall be discharged." [7]
>
> "*Premiums—Discounts*—7. It shall be considered unfair practice to pay premiums or allow discounts of any sort to new customers." [8]
>
> "*Advertising*—10. Except as the same may be conducted through an association of contracting distributors, it shall be considered unfair practice:
>
> (a) To take advertising in any program, periodical, or publication of any kind whatsoever unless such publication has a general paid circulation or is for sale on news stands. Advertisements or display type in telephone directories, advertisements in hotel registers, and radio advertising are to be considered in the same class as program advertisements.
>
> (b) To conduct exhibits and displays, such as floats, wagons, automobiles, and similar displays in parades and like activities.

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[5] Code of Fair Competition in the Petroleum Industry. Approved Aug. 19, 1933. Art. V, Rule 4, Vol. IIA, Federal Trade Regulation Service, Commerce Clearing House, Inc., ¶ 8510.01, p. 8066.

[6] Marketing Agreement for Milk—Chicago Milk Shed. Approved July 28, 1933. *Id.* at ¶ 8101.01, Exhibit D, § 1, p. 7005.

[7] *Id.* Exhibit D, § 4.

[8] *Id.* Exhibit D, § 7.

(c) To buy tickets for benefits, concerts, fairs, and exhibits." [9]

"*Giving Goods Away*—11. It shall be considered unfair practice to give away goods." [10]

The above provisions have actually been approved by the Secretary of Agriculture and licenses have been issued thereunder, so that it is now illegal in the areas affected by the agreements for any person, whether or not he has signed the agreement, to do any of the things prohibited. The following are some of the unfair trade practices prohibited in some of the agreements which have been presented and on which hearings have been held, but which have not yet been approved by the Secretary of Agriculture:

"The defamation of competitors by falsely imputing to them dishonorable conduct, inability to perform contracts, questionable credit standing, or by other false representation, or the false disparagement of the grade or quality of their goods, with the tendency and capacity to mislead or deceive purchasers or prospective purchasers." [11]

"Wilfully enticing away the employees of competitors with the purpose and effect of unduly hampering, injuring, or embarrassing competitors in their businesses." [12]

"The practice of shipping or delivering products which do not conform to the samples submitted or representation made prior to securing the orders, without the consent of the purchasers to such substitutions, and with the effect of deceiving or misleading purchasers." [13]

"The making or causing or permitting to be made or published any false, untrue, or deceptive statement by way of advertisement or otherwise concerning the grade, quality, quantity, substance, character, nature, origin, size or preparation of any product of the industry, having the tendency and capacity to mislead or deceive purchasers or prospective purchasers." [14]

"Securing information from competitors concerning their businesses by false or misleading statements or representations or by false impersonations of one in authority and the wrongful use thereof to unduly hinder or stifle the competition of such competitors." [15]

It can readily be seen that the purpose of these rules is to carry out President Roosevelt's idea that in the case where 90% of an industry are willing to abide by rules of fair competition the remaining 10% who by their unfair methods of competition have affected that industry, should be forced to comply with the rules by which the majority are willing to be governed. Whether or not they will accomplish that purpose remains to

[9] *Id.* Exhibit D, § 10.
[10] *Id.* Exhibit D, § 11.
[11] National Marketing Agreement for Frozen Desserts. (Rules of Fair Trade Practice).
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*

be seen, but the result will be, at least for the time being, to discourage individual enterprise and initiative in the interests of a stabilized and cooperative industry.

Methods of Administration

Another vital part of these agreements are those clauses which provide for their administration. There has been a great deal of discussion in Washington as to whether the various industries should be self administered, subject to final appeal to the United States government, or whether the government in the first instance should be the sole administrator. It seems obvious that the government, even with the great number of employees employed under the *Recovery Act* and in the Department of Agriculture, does not have sufficient man power to govern in detail each of the industries in the country, and these agreements therefore have uniformly provided for a system of administration controlled in the first instance by the industry affected.

In the national agreement for the butter industry, which has not as yet been signed but which has been submitted to the Agricultural Adjustment Administration, and which is typical, a National Butter Board is set up consisting of ten members, five to be chosen by the leading association of butter manufacturers and five to be chosen by the leading producers' cooperative association. The agreement provides that the duties of the Board shall include the following:

1. The promulgation of rules, regulations, practices and policies to carry out the agreement and the purposes of the Act.
2. The study of butter exchanges and similar organizations and the making of suggestions for their reorganization.
3. The making of recommendations to the Secretary for the stabilization of butter prices.
4. The collecting of information and data on production and consumption of butter.
5. The appointment of various sub-committees.
6. The cooperation with duly constituted representatives of other branches of the dairy industry.
7. The investigating of violations of the agreement; the holding of hearings thereon; the making of findings of fact and reports.
8. The reporting of such violations to the Secretary of Agriculture and the making of recommendations with respect to penalties to be meted out to violators.

The thought behind the creation of each of these boards is not only to enforce the provisions of the agreement and to carry out the policies of the *Agricultural Adjustment Act,* but includes cooperation with all branches of industry to the end that the producers may receive the highest possible

price for their product and that the consumers may receive the best possible product at a fair price, which will include a fair profit to the manufacturers.

Production Control

One of the main purposes of the *Agricultural Adjustment Act,* as can be seen from the declaration of policy which was quoted in the first part of this article, is to control production to the end that supply and demand will be reasonably in line and thereby to insure the producer a greater return for his labor. To that end most of the agreements which have been so far approved provide for various systems of production control. These systems vary in accordance with the product which is being considered, and in the case of dairy products often include the much discussed basic and surplus allotment plan.

General Provisions

The agreements generally contain a provision requiring uniform systems of accounting to be kept by the contracting parties and requiring that the books and records of the contracting parties be opened during the usual hours of business to the Secretary of Agriculture or his duly authorized agent, and they permit the Secretary of Agriculture to make summaries of the information thus obtained and to publish such summaries for the general information of the public and of the industry. The Secretary of Agriculture is generally required to hold the information confidential as to its details unless he is subpœnaed by a court or a governmental agency which has that power.

The agreements and the Act of course are based upon the government's authority over interstate commerce and the agreements usually contain recitals to show that the business which it is sought to regulate is wholly an interstate business or is so inextricably intermingled with interstate business as to permit regulation by the federal government.

Termination

All of the agreements of course contain provisions as to termination and provide that 75% of the contracting producers or contracting distributors may terminate the agreement on thirty days' notice. They also provide that the agreements may be terminated by the Secretary of Agriculture at any time upon twenty-four hours' notice by a press release, and that the agreement terminates automatically "whenever the provisions of the Act authorizing the agreement shall cease to be in effect".

The Act itself provides as follows with respect to Title I thereof:

> "This title shall cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has been ended; and pending such time the President shall

by proclamation terminate with respect to any basic agricultural commodity such provisions of this title as he finds are not requisite to carrying out the declared policy with respect to such commodity. The Secretary of Agriculture shall make such investigations and reports thereon to the President as may be necessary to aid him in executing this section." [16]

If the Act were to be declared unconstitutional the agreements would automatically terminate and the fact that some persons had voluntarily entered into them would not affect that result because all agreements so far signed have been made specifically dependent on the Act.

Enforcement

It can readily be seen that these agreements, in order to be effective, must be provided with teeth, and the Act provides those teeth in the following words:

"Sec. 8. In order to effecuate [*sic*] the declared policy, the Secretary of Agriculture shall have power . . .

"(3) To issue licenses permitting processors, associations of producers, and others to engage in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof. Such licenses shall be subject to such terms and conditions, not in conflict with existing Acts of Congress or regulations pursuant thereto, as may be necessary to eliminate unfair practices or charges that prevent or tend to prevent the effectuation of the declared policy and the restoration of normal economic conditions in the marketing of such commodities or products and the financing thereof. The Secretary of Agriculture may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the Secretary suspending or revoking any such license shall be final if in accordance with law. Any such person engaged in such handling without a license as required by the Secretary under this section shall be subject to a fine of not more than $1,000 for each day during which the violation continues."

Up to the present time the Secretary of Agriculture has licensed distributors after the signing of an agreement by those doing the major volume of business in the area affected. No attempt has been made to issue individual licenses to each person in business in the territory. Instead, a blanket license has been issued, the original of which has been signed by the Secretary and is on file at Washington. The persons licensed have in each case been the distributors of farm products and no attempt has been made to license the producers. It is provided in the regulations of the Secretary of Agriculture, approved by the President, that any distributor by the payment of $2 may obtain a certificate evidencing the fact that the holder

[16] Agricultural Adjustment Act, *supra* note 1, § 13.

thereof is a licensee,[17] but such certificate is not necessary to constitute a distributor a licensee. He becomes such by the mere act of the Secretary in issuing a license to all persons in the business in the territory affected.

The license itself usually follows very closely the wording of the marketing agreement. It begins with a list of the definitions of the words used in the license, which usually follow those definitions as used in the marketing agreement. It then, in general, follows the terms of the marketing agreement and incorporates the price schedules, the rules for production control and the fair practice rules, together with the requirements for the keeping of accounts. Both the marketing agreements and the licenses usually have elaborate introductory clauses in which it is set out in full how necessary it is that the agreement or the licenses, as the case may be, should be made effective, and describing the investigation which has been made into the situation and the fact that the matter is one for the federal government by reason of its interstate commerce features.

When one comes to think of it, it is an amazing legal proposition that by merely issuing such a license under the terms of a marketing agreement an officer of the executive branch of the federal government thereby enacts a law which, if violated, subjects the violator, with or without his consent, to the revocation of his license and thereafter to a penalty of a $1000 a day fine for operating without a license. This result of the *Agricultural Adjustment Act* and the marketing agreements which have been entered into thereunder must bring to the mind of every lawyer the question as to whether or not such an act is constitutional and the further question as to whether or not it is constitutional for the federal government to fix wholesale and retail prices of articles in intrastate commerce.

Constitutionality

Several articles have been written with respect to the constitutionality of the act prohibiting gold payments and of the *National Recovery Act*.[18] A large part of what has been said in these discussions is applicable to the *Agricultural Adjustment Act*.

In the recent cases, *Beck v. Wallace* and *Economy Dairy Company v. Wallace*,[19] decided by the Supreme Court of the District of Columbia, the constitutionality of the *Agricultural Adjustment Act* was upheld, and with

[17] Milk Regulation, Series I, § 300, Agricultural Adjustment Administration. Approved by the President July 22, 1933.

[18] Post and Willard, *The Power of Congress to Nullify Gold Clauses* (1933) 46 HARV. L. REV. 1225; Hanna, *Federal Currency Restrictions and Gold Contracts* (1933) 9 A. B. A. J. 349; Boudin, *Is Economic Planning Constitutional?* (1933) 21 GEO. L. J. 253, 387; Handler, *National Industrial Recovery Act* (1933) 9 A. B. A. J. 440, at 444; Beck, *The National Recovery Act in the Supreme Court* (Nov. 1933) FORTUNE 48; Hervey, *Some Constitutional Aspects of the National Industrial Recovery Act* (1933) 8 TEMPLE L. Q. 3; Note (1933) 47 HARV. L. REV. 85.

[19] U. S. Law Week, Sept. 5, 1933, at 9. See also Southport Petroleum Co. v. Ickes (1933) 41 WASH. L. REP. 577, in which the Oil Code under the National Industrial Recovery Act was upheld as constitutional.

it the provisions of the Chicago Milk Marketing Agreement, which among other things fixed prices to be paid to producers in the Chicago Milk Shed and fixed the prices at which milk and its products should be sold both at wholesale and retail in the Chicago metropolitan area.[20] Counsel for the complainants in that case based their contention for the unconstitutionality of the *Agricultural Adjustment Act* upon the following propositions:

1. That the Act is not within the powers delegated to the Congress under the commerce clause.

2. That the Act violates the due process clause of the Fifth Amendment.

3. That the Act unconstitutionally delegates legislative power to the Secretary of Agriculture.

4. That the Act violates the rights of the states as protected by the Tenth Amendment.

Rather than take the first two arguments separately, I believe it advisable to consider them together. It has long been the law and it was settled beyond doubt in the *Legal Tender Cases,*[21] that in the exercise of an "express power" or of a "power necessary and proper for carrying an express power" into execution, often called an "implied power", Congress may legislate in the public interest as it wills, provided the means employed bear a fair and reasonable relation to the lawful object. The Fifth Amendment prohibits the unreasonable and arbitrary deprivation of property, but where the legislation is in the public interest and is designed to carry out such powers the prohibition gives way and the law has conformed with the requirements of "due process".

In the present case the power of Congress to provide for such marketing agreements and for the fixing of prices under them rests squarely on the commerce clause of the Constitution. It is so with the greater part of the present administration's legislation.

The Commerce Power

We therefore must decide whether this Act is a proper exercise of the federal government's right to "regulate interstate commerce". (For the moment I defer discussing the processing tax feature of the Act, which of course depends also on the taxing power.)

It must be noted immediately that the Act contemplates, and the marketing agreements have provided, that agricultural products may be controlled from the place of their production through transportation all the way to their final resting place in the hands of the retail consumer.

[20] *Supra* note 6, Exhibits A and C.

[21] Knox v. Lee; Parker v. Davis, 12 Wall. 457 (U. S. 1870). See also Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122 (1884).

In the case of milk, methods of production control and fixed prices to be paid to the farmer are at one end and fixed prices to be paid by the retail consumer are at the other. The area in between is well covered by fair practice rules, methods of administration and wholesale prices.

A mere statement of these facts shows that to uphold the constitutionality of this feature of the law, the commerce clause must be liberally construed and further, that the case of *Hammer v. Dagenhart* [22] and many other cases cited therein supporting the doctrine of states' rights both before commerce has begun and after commerce has ceased, must be reversed or distinguished.

It is my opinion that what the Supreme Court does to that case will be determinative of the constitutionality of most of the emergency legislation. Will the Court follow, overrule or distinguish? I do not pretend to be able to predict what will be done, but in my opinion the case, at least on its facts, can be technically distinguished.

Let us examine the case. The facts were these: Congress passed an act which prohibited the transportation in interstate commerce of goods made at a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen years had been employed or permitted to work, or children between the ages of fourteen and sixteen years had been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of 7 P. M. or before the hour of 6 A. M. This statute was held unconstitutional by a five to four decision. Which of its facts are important for our purpose? First, it should be noted that there is no regulation of commerce at all. At the time the statute applies there has been no commerce. The act prohibits the receipt for shipment of the article. Second, there is no regulation of the destination. Third, there is involved no traffic,[23] no transportation [24] and no intercourse.[25] There was merely involved the manufacture of a product.

In the course of the opinion, after discussing the previous cases where the regulatory power of Congress had been upheld, the Court, through Mr. Justice Day, said:

> "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regu-

[22] 247 U. S. 251, 38 Sup. Ct. 529 (1918).

[23] "Commerce" is recognized and interpreted to mean "traffic" in Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276 (1905) (Stock Yards Act); Stafford v. Wallace, 258 U. S. 495, 42 Sup. Ct. 397 (1922) (Packers & Stockyards Act); Board of Trade v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470 (1922) (Grain Futures Act).

[24] "Commerce" is recognized and interpreted to mean "transportation" in Gibbons v. Ogden, 9 Wheat. 1 (U. S. 1824).

[25] "Commerce" was said to be "intercourse" by Marshall, C. J., *ibid.*

late, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

"This element is wanting in the present case . . . The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states . . ., and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power." [26]

These facts are obviously very different from the present case. In a marketing agreement the production, transportation and dissemination and sale of the product are involved. Here you have traffic, transportation and intercourse, and where the movement is between states you have interstate traffic, transportation and intercourse. That has been held to be interstate commerce. This is sufficient, I believe, to allow us to distinguish the facts. However, it is a great deal easier to distinguish the facts than it is to distinguish the other grounds for the decision as expressed by the Court.

To quote further:

"It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other States where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the State of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those States where the local laws do not meet what Congress deems to be the more just standard of other States.

"There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions . . .

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

"The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution." [27]

As a final word the Court clearly stated what it conceived to be its duty and what would be the result of violating that duty by upholding the legislation in controversy.

[26] Hammer v. Dagenhart, *supra* note 22, at 271, 38 Sup. Ct. at 531.
[27] *Id.* at 273, 38 Sup. Ct. at 531.

"We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the states. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution . . . The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed." [28]

It is the broad constitutional doctrine of states' rights and its apparent infringement by the emergency legislation which has given most constitutional authorities the greatest concern. They argue that the affirmance of this legislation will virtually destroy the rights of the states to exercise any control over business whatsoever, and will nullify the Tenth Amendment entirely. They point out that this doctrine is the foundation stone of the Constitution and was supported by James Madison, Chief Justice White, and many other figures in constitutional history.

On the other hand, Edward S. Corwin, Professor of Jurisprudence at Princeton University, in a recently published article,[29] discusses this phase of the matter at some length and concludes that "Madison's and White's views are outmoded by times and conditions which vindicate Marshall's prophetic vision".[30] Professor Corwin believes that the doctrine of dual sovereignty as set forth in *Hammer v. Dagenhart* [31] will not be sustained by the Court in considering future legislation under the commerce clause.[32]

[28] *Id.* at 276, 38 Sup. Ct. at 532.

[29] Corwin, *Congress' Power to Prohibit Commerce—A Crucial Constitutional Issue* (1933) 18 CORN. L. Q. 477.

[30] *Id.* at 504.

[31] *Supra* note 22.

[32] "Hammer v. Dagenhart represents high tide in the more recent surges of Madisonian doctrine. What is the standing of this decision now, fifteen years later? [Professor Corwin here discusses United States v. Hill, *infra* note 46; and Brooks v. United States, *infra* note 47].

"Hammer v. Dagenhart is today elbowed into rather narrow quarters. Moreover, it may happen with a legal, as with a military position, which does not yield readily to assault, that it may be turned. Indeed, it has occurred more than once in recent years that the Court by a radical shift of position with reference to a vexed constitutional problem, has thrown the latter into an entirely new perspective, and with striking results in constitutional interpretation. Why should not something of the same nature take place in the present instance? The truth is that it has, although the transfer of position alluded to is not yet complete. . . .

"Interstate commerce, or rather interstate business, thus takes on the territorial aspect of a field over which national power must hold sway if its activities are not to take place beyond the reach of a supervisory political judgment. Its articulated structure could indeed be restored to effective local control only to destroy it. As to it state power is actually non-exist-

He further believes that there is ample authority for holding that the commerce clause covers the legislation of the recent administration. With that thought in mind let us consider the physically intrastate commerce which it is also proposed to regulate. Suppose a farmer produces wheat in Pennsylvania and transports it and sells it in Pennsylvania. Can the federal government fix prices to be paid to such a farmer?

The cases bearing on this point have a very direct and startling application not only to it but also to the interstate traffic described above.

In the case of *Southern Railway Co. v. United States,*[33] the Supreme Court held that in a given case when appropriate findings of fact are made to the effect that interstate and intrastate commerce are intermingled, Congress may properly pass an act controlling both. The act considered in that case provided that safety appliances should be carried on all trains operated by railroads "engaged in interstate commerce". This was held to apply not only to those trains actually engaged in interstate commerce, but also to trains operated by such railroads between points in the same state. The reasoning back of this opinion is that Congress has the power to "foster, protect, control and restrain" where interstate or foreign commerce is concerned, and that where interstate and intrastate commerce were interdependent, Congress, under the commerce clause, could control both.[34]

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ent—an empty fiction. It is to be governed at all, it must be by the National Government. . . . The determinative question is this: Does the Interstate Market serve to capitalize conditions which may reasonably be thought to be destructive of the national prosperity if persisted in, or does it afford the means of deriving private advantage from socially undesirable conditions? If so, Congress is entitled to take corrective action.

"And the vital defect of Hammer v. Dagenhart against this background is seen at once to have been its sheer anachronism." Corwin, *supra* note 29, at 499-503.

[33] 222 U. S. 20, 32 Sup. Ct. 2 (1911).

[34] That this was the motivating influence for the Court's opinion is shown by the following language:

> "We come then to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic and the object which the acts are obviously designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? . . .
>
> "Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence

The question to be decided in a given case, as the Supreme Court has stated in *Florida v. United States*,[35] is as to the "propriety of the exertion" of the power,[36] and this is mainly a question of fact. These questions of fact have been the subject of investigation and consideration by the Secretary of Agriculture, and before approving marketing agreements and in pursuance of the powers vested in him by the Act, pertinent findings have been made by him.

It is impossible to discuss all of the cases where the Supreme Court has sustained Congressional legislation of broad interstate and in some cases intrastate control under the commerce clause, but in recent years the Court has affirmed the constitutionality of the following laws:

The *Wilson Act* of 1890, subjecting intoxicants upon their "arrival" in a state to the laws thereof;[37] the *Anti-Lottery Act* of 1895,[38] closing the channels of interstate transportation to lottery tickets, an earlier act having already banned lottery tickets from the mails;[39] an act passed in 1900 excluding from interstate transportation game slaughtered in violation of state laws;[40] the *Pure Food and Drug Act* of 1906, barring from interstate transportation foods and drugs not inspected and labelled in accordance with the *Act;*[41] the commodity clause of the *Hepburn Act* of the same year, forbidding interstate carriers to transport in interstate commerce commodities in which they have any interest "direct or indirect";[42] the *Mann Act* of 1910, forbidding the transporting of women from one state to another for immoral purposes;[43] the *Webb-Kenyon Act* of 1913, prohibit-

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of appropriate safety appliance from any part of any train is a menace not only to that train but to others.

"These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative." *Id.* at 26, 27, 32 Sup. Ct. at 4.

[35] 282 U. S. 194, 51 Sup. Ct. 119 (1931).

[36] "The question in the present cases, then, is not one of authority, but its appropriate exercise. The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that, whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear." *Id.* at 211, 51 Sup. Ct. at 124.

[37] 26 STAT. 313 (1890). Held constitutional in *In re* Kahner, 140 U. S. 545, 11 Sup. Ct. 865 (1891).

[38] 28 STAT. 963 (1895), 18 U. S. C. A. § 387 (1926). France v. United States, 164 U. S. 676, 17 Sup. Ct. 219 (1897); Champion v. Ames, 188 U. S. 321, 23 Sup. Ct. 321 (1903).

[39] 26 STAT. 465 (1890), 18 U. S. C. A. § 336 (1926). *Ex Parte* Rapier, 143 U. S. 110, 12 Sup. Ct. 374 (1892).

[40] 31 STAT. 188 (1900), amended 35 STAT. 1137 (1909), 18 U. S. C. A. § 392 (1926). This Act has not been passed on directly by the Supreme Court. But see Silz v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10 (1908). *Cf.* Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600 (1896).

[41] 34 STAT. 768 (1906), 21 U. S. C. A. §§ 1-3 (1926). Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364 (1911).

[42] 34 STAT. 584 (1906), 49 U. S. C. A. § 1 (8) (1926). Great Northern Ry. v. United States, 208 U. S. 452, 28 Sup. Ct. 313 (1908). *Cf.* Bitterman v. Louisville & Nashville Ry., 207 U. S. 205, 28 Sup. Ct. 91 (1907).

[43] 36 STAT. 825 (1910), 18 U. S. C. A. §§ 397-404 (1926). Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281 (1913). See also, Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192 (1917).

ing the shipment of intoxicants into a state, there to be used in violation of its laws;[44] the *Federal Quarantine Act* of 1917, forbidding the shipment from infected areas of diseased plants and shrubs;[45] the *Read Bone-Dry Amendment* of 1917, forbidding the transportation of intoxicants into any state which forbids the manufacture thereof;[46] the *Federal Motor Vehicle Act* of 1919, prohibiting the transportation of stolen motor vehicles from one state to another and the receiving, concealment, or sale of the same.[47]

Some of these cases are based on the theory that the product itself is harmful, but that certainly cannot be said of all, as for instance the *Federal Motor Vehicle Act.* Some students believe most of them can be justified under the so-called federal "police power"; others deny that such a power exists.

No discussion of the right of Congress to control intrastate commerce would be complete without at least a reference to the theory which is now being advocated in Washington. Many of the lawyers attached to the administration are taking the position that it is not only in the physical sense that interstate commerce can be regulated by the federal government. They say that the physical conception of interstate commerce is not sufficient, but that in addition whether or not the federal government has control should depend upon an economic conception. This conception is that an article or a transaction is in interstate commerce if it economically depends on or competes with other articles which are physically in interstate commerce. For instance: where the prices of an article are dependent upon world competition, there is an element of interstate commerce on the theory that the marketing and sale of the product, although in a particular case entirely intrastate, is so bound up with such competition and with conditions involving similar products transported in interstate commerce that the commerce power extends to the physically intrastate transaction. I will leave a further and more detailed discussion of this theory for some other writer. However, in this connection, it is interesting to note that the federal government has asked the states to cooperate in the emergency legislation, notably in the *N. I. R. A.*, by enacting similar legislation governing intrastate transactions.

Having discussed the power of Congress under the commerce clause, it is now necessary to direct attention to the question whether, even if it

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[44] 37 STAT. 699 (1913). Clark Distilling Co. v. Western Md. Ry., 242 U. S. 311, 37 Sup. Ct. 180 (1917).

[45] 39 STAT. 1165 (1917), 7 U. S. C. A. § 161 (1926). Oregon-Washington R. R. & Nav. Co. v. State of Washington, 270 U. S. 87, 46 Sup. Ct. 279 (1926).

[46] 39 STAT. 1069 (1917), 18 U. S. C. A. § 341 (1926). United States v. Hill, 248 U. S. 420, 39 Sup. Ct. 143 (1919).

[47] 41 STAT. 324 (1919), 18 U. S. C. A. § 408 (1926). Brooks v. United States, 267 U. S. 432, 45 Sup. Ct. 345 (1925).

does exist, the means employed by Congress bear a fair and reasonable relation to the object in view.

Due Process

It must be admitted as a matter of constitutional law that Congress does not have emergency powers as such. However, in interpreting the due process clause, the Supreme Court has allowed Congress to go far afield in obtaining the means to effect the lawful object in cases where an emergency existed and especially where the legislation was temporary in character.

It is believed by some that in times of emergency the implied powers automatically increase through more liberal construction. The following cases are illustrative of this emergency idea:

In the case of *Wilson v. New,*[48] the Supreme Court sustained the *Adamson Act* fixing the hours and wages of railway employees, passed to meet the situation created by the threatened strike in 1916. In *Block v. Hirsh,*[49] the Supreme Court sustained the validity of housing laws requiring a landlord to permit a tenant to continue in possession under an expired lease on the same terms and conditions set forth in the lease unless those terms and conditions were changed by a board which was created for that purpose. These cases sustain the elastic character of the due process clause in its application to changing conditions. It may also be argued that the same elasticity can be applied to the commerce clause.

In order to obtain the full force of those decisions it is necessary to quote briefly from them:

In *Wilson v. New et al.,*[49a] the Court, speaking through Mr. Chief Justice White, said:

> "That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, state and federal, and is illustrated by such a continuous exertion of state and federal legislative power as to leave no room for question on the subject. It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority. But taking all these propositions as undoubted, if the situation which we have described and with which the act of Congress dealt be

[48] 243 U. S. 332, 37 Sup. Ct. 298 (1917).
[49] 256 U. S. 135, 41 Sup. Ct. 458 (1921); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465 (1921); Levy Leasing Co., Inc., v. Siegel, 258 U. S. 242, 42 Sup. Ct. 289 (1922).
[49a] *Supra* note 48, at 347, 37 Sup. Ct. at 301.

taken into view, that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent, it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a standard of wages to fill the want of one caused by the failure to exert the private right on the subject and to give effect by appropriate legislation to the regulations thus adopted. This must be unless it can be said that the right to so regulate as to save and protect the public interest did not apply to a case where the destruction of the public right was imminent as the result of a dispute between the parties and their consequent failure to establish by private agreement the standard of wages which was essential; in other words, that the existence of the public right and the public power to preserve it was wholly under the control of the private right to establish a standard by agreement. Nor is it an answer to this view to suggest that the situation was one of emergency and that emergency cannot be made the source of power. Ex parte Milligan, 4 Wall. 2. The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce may be by anticipation legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce."

In *Block v. Hirsh* [49b] the Court, speaking through Mr. Justice Holmes, said:

"The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance, in German Alliance Insurance Co. v. Lewis, 233 U. S. 389; irrigation, in Clark v. Nash, 198 U. S. 361; and mining, in Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527. They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest, Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. 30, 32, and that the public interest may extend to the use of land. They dispel the notion that what in its immediate aspect may be only a private transac-

[49b] *Supra* note 49, at 155, 41 Sup. Ct. at 459.

tion may not be raised by its class or character to a public affair. See also Noble State Bank v. Haskell, 219 U. S. 104, 110, 111." . . . "The main point against the law is that tenants are allowed to remain in possession at the same rent that they have been paying, unless modified by the Commission established by the act, and that thus the use of the land and the right of the owner to do what he will with his own and to make what contracts he pleases are cut down. But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since Munn v. Illinois, 94 U. S. 113. It is said that a grain elevator may go out of business whereas here the use is fastened upon the land. The power to go out of business, when it exists, is an illusory answer to gas companies and waterworks, but we need not stop at that. *The regulation is put and justified only as a temporary measure.* See Wilson v. New, 243 U. S. 332, 345, 346. Fort Smith & Western R. R. Co. v. Mills, 253 U. S. 206. *A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.*"

In the present case it has been contended that the marketing and distribution of agricultural food products is affected with a public interest and that its regulation is a reasonable and proper exercise of the commerce power, even though it may restrain the liberty of action and liberty of contract of and take property from certain individuals. Being affected with such interest, it is contended that price fixing is proper.

In this connection the recent case of *New State Ice Co. v. Liebmann,*[50] is most important. In that case by another five to four decision the Supreme Court declared unconstitutional an Oklahoma statute requiring all persons in the ice business to obtain a certificate of public necessity (in effect a license to do business), thereby making the ice business a public utility.

In *Adkins v. Children's Hospital,*[51] the Supreme Court held unconstitutional the minimum wage law for women in the District of Columbia. To the same effect is *Williams v. Standard Oil Co.,*[52] holding unconstitutional a Tennessee statute fixing the price of gasoline.

In *Wolff Packing Co. v. Industrial Relations Court,*[53] the Supreme Court held unconstitutional a Kansas statute creating an industrial court with power to fix prices, wages, and hours of labor.

Nearest to our present case is *Fairmont Creamery v. Minnesota,*[54] holding unconstitutional a Minnesota statute requiring the buyer of milk to pay a uniform price therefor. In that case the Supreme Court said:

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[50] 285 U. S. 262, 52 Sup. Ct. 371 (1932).
[51] 261 U. S. 525, 43 Sup. Ct. 394 (1923).
[52] 278 U. S. 235, 49 Sup. Ct. 115 (1929).
[53] 262 U. S. 522, 43 Sup. Ct. 630 (1923).
[54] 274 U. S. 1, 47 Sup. Ct. 506 (1927).

> "Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences but the reverse." [55]

To the same effect is *Tyson & Bro. v. Banton.*[56] These cases were decided on the theory that the statute violated the due process clause of the Fourteenth Amendment, which is the same in phraseology as that of the Fifth Amendment.

Although the Fourteenth Amendment applies only to the states and the Fifth Amendment only to the federal government, the analogy is clear and cases under the Fourteenth Amendment should be given great weight in interpreting the Fifth Amendment.

As against these decisions we have the so-called emergency decisions quoted above and also the decision of the Court of Appeals of New York sustaining the recently enacted *Emergency Milk Control Law* of that state, under which a milk control board is empowered to fix prices for milk and its products.[57] This case is now before the Supreme Court of the United States for review, a writ of *certiorari* having been granted.

The New York Court of Appeals in deciding that case, speaking through Chief Justice Pound, said:

> "Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract . . . But we must not fail to consider . . . that constitutional law is a progressive science; that statutes aiming to establish a standard of social justice, to conform the law to the accepted standards of the community, to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view . . . and that mere novelty is no objection to legislation." [58]

Delegation of Legislative Authority

It has been further contended that the *Agricultural Adjustment Act* is an unlawful delegation of legislative power to the executive branch of the government. In this regard the most important precedents are the *Interstate Commerce Act,* the *Federal Trade Commission Act,* and the *Tariff Act* of 1922, in which the legislature delegated to the executive branch the right to carry out the details in applying a general statutory standard to specific

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[55] *Id.* at 9, 47 Sup. Ct. at 508.

[56] 273 U. S. 418, 47 Sup. Ct. 426 (1927).

[57] People v. Nebbia, 262 N. Y. 259, 186 N. E. 694 (1933). For a discussion of the problem involved in this case, see Manley, *Constitutionality of Regulating Milk as a Public Utility* (1933) 18 CORN. L. Q. 410.

[58] People v. Nebbia, *supra* note 57, at 270, 186 N. E. at 699.

conditions. This included the right to issue regulations, as does the *Agricultural Adjustment Act.*

In the case of *Hampton & Co. v. United States,* in which the Supreme Court sustained the flexible provisions of the *Tariff Act* of 1922, the Court, speaking through Chief Justice Taft, said: [59]

> "The field of Congress involves all and many varieties of legislative action and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations."

General

It is also necessary to consider the process tax provided for in the Act. Although the clauses authorizing a process tax are separate from the title authorizing marketing agreements, and although the Act contains a separability clause, they are closely interrelated, since the proceeds of the process tax are used to pay for the administration of marketing agreements. Some persons have argued that they are so closely related that the unconstitutionality of the tax act feature would void the entire Act.

In a recent article,[61] Kingman Brewster, of the Washington, D. C., Bar, reaches the conclusion that the tax is not constitutional largely on the ground that the devoting of public funds to private enterprises is illegal and was so held in the *Sugar Bounty Cases,*[62] and in *Loan Association v. Topeka,*[63] and on the further ground that there is no public interest involved and that therefore price fixing is illegal.

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[59] 276 U. S. 394, at 406, 48 Sup. Ct. 348, at 351 (1928).

[60] A long line of cases has established that it is entirely proper for Congress, having once expressed its will, to defer to another governmental branch the working out and enforcement of that will. As Mr. Justice Lamar said in United States v. Grimaud, 220 U. S. 506, 517, 31 Sup. Ct. 480, 483 (1911): "From the beginning of the Government various acts have been passed conferring upon executive officers powers to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done." Mr. Justice Harlan, in Union Bridge Co. v. United States, 204 U. S. 364, 387, 27 Sup. Ct. 367, 374 (1907) expressed himself in these words: "Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business." See also Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495 (1892); Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1904); *In re* Kollock, 165 U. S. 526, 17 Sup. Ct. 444 (1897); Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320, 29 Sup. Ct. 671 (1909). Interstate Commerce Commission v. Goodrich Transit Company, 224 U. S. 194, 32 Sup. Ct. 436 (1912).

[61] Brewster, *Is the Process Tax Constitutional?* (1933) 19 A. B. A. J. 419.

[62] United States v. Realty Co.; United States v. Gay, 163 U. S. 427, 16 Sup. Ct. 1120 (1896).

[63] 20 Wall. 655 (U. S. 1874).

It should be noted that even if the Act itself is found to be constitutional, it does not follow that all clauses of marketing agreements entered into under the law are valid. An executive license issued under the Act may, by unfairness or discrimination or confiscation or failure to apply the law properly, be illegal and even unconstitutional.

Conclusion on Constitutionality

In considering the constitutionality of the Act, it has been my effort to present the most important cases which would have to be considered by the Supreme Court in the event that it is called upon to pass upon its constitutionality. Those who believe that the Act is constitutional must rely, in the last analysis, upon one or two cases which were decided under unusual circumstances. Those who believe the Act is unconstitutional can rely upon many decisions under the due process clause of the Fourteenth Amendment and also upon the Court's views as expressed in *Hammer v. Dagenhart,*[64] particularly with reference to states' rights.

From examining these cases, it is apparent that in order to find the Act constitutional the Supreme Court will have to extend the commerce clause further than it has ever before been extended, even under unusual circumstances, and that they will have to do likewise with the taxing power and with the due process clause. This is particularly true as it is applied to the fixing of prices to the producer and prices to the consumer, for the reason that under the views of many earlier cases the former occurs before commerce has begun, and the latter occurs after commerce has ceased, and both are "without due process of law" unless the business is affected with a public interest. Furthermore, when the transaction occurs entirely within the boundaries of one state, there is no interstate commerce in the physical sense whatsoever. While it may be possible, technically, for the Court to extend the rules of *Block v. Hirsh* and *Wilson v. New,*[65] to do so will amount to a social and economic revolution, and, in the view of most lawyers, to a revolution in constitutional interpretation. In deciding the question the Court is bound to consider not only the legal principles involved, but also the questions of social philosophy which are presented,[66] and on these the issue is squarely joined whether or not the principles of individualism and freedom of action, and above all of states' rights, on which our country was founded and which were undoubtedly in the minds of the Constitutional Convention at the time the Constitution was written, are to be abandoned in favor of a new system of federal control.

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[64] *Supra* note 22.

[65] Text, *supra* pages 107, 108.

[66] Sharp, *Movement in Supreme Court Adjudication* (1933) 46 HARV. L. REV. 361, 795.

Conclusion

Irrespective of what action may be taken by the Supreme Court, it is my opinion that these Recovery Acts will leave a very definite impression on American society. Through their operation during the summer months we have seen in Washington a resurgence of what occurred during the war time period. Thousands of persons in various lines of industry have come together in a sincere effort to cooperate. Through the demand for cooperation has come the growth of the trade association to a point far beyond anything that it has so far reached in this country. It may be that arbitration of disputes through trade associations will grow up and relieve our courts of the burdens now carried by them. It may be that the industry committees constituted by the trade associations will be a sort of "super power" subject only to the control of the government through a veto or through other means. Even though the Acts were declared unconstitutional tomorrow, it is my opinion that industry, through this development, has grown to know its problems in the larger sense better than at any time heretofore, and that that will be a lasting benefit. Nevertheless, if this method of society continues, it is bound to result in curtailment of personal liberties, in a much greater difficulty for the newcomer to enter into business, and a distinct lull in initiative, enterprise, and new invention. Reliance on self may well be replaced by reliance on government, and other results equally revolutionary may well occur.

I emphasize these things because, in the last analysis, if the people desire a continuance of the *N. I. R. A.* and the *A. A. A.* and kindred legislation, they have it in their power to amend our Constitution, and the fact that the Supreme Court may or may not declare the present measures unconstitutional will in the long run possibly not be of much effect. It is these questions of social philosophy which in the last analysis will always govern our laws, and it is well for the student of current legislation to consider that the law merely reflects the conditions under which it was enacted, and that as those conditions change, an entirely different conception of the law and its functions may arise, and entirely new laws may be enacted which will have received the sanction of the people and will be binding on all.